UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 118

Docket Nos. SF-3330-09-0725-I-1
SF-300A-10-0045-I-1

Michael B. Graves,

Appellant,

v.

Department of Veterans Affairs,

Agency.

June 22, 2010

Michael B. Graves, Los Angeles, California, pro se.

Maureen Ney, Esquire, Los Angeles, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that denied corrective action in his Veterans Employment Opportunities Act (VEOA) appeal and dismissed his employment practices appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115 concerning the VEOA appeal and REMAND it for further adjudication consistent with this Opinion and Order. We DENY the petition for review concerning the employment practices appeal.

BACKGROUND

¶2 The agency announced two or three vacancies for "hybrid" Medical Records Technician (MRT) positions under 38 U.S.C. § 7401(3). The vacancy announcement was open to all U.S. citizens from December 29, 2008, to January 13, 2009. Initial Appeal File (IAF), Tab 22, Exs. 8-9. The agency contended that the final certificate of qualified candidates for the vacancies was issued on February 10, 2009, and a memorandum indicates selections were made on March 6, 2009. *Id.*, Tab 15 at 2, Ex. 1. Although the agency claimed to have made two selections on March 6, 2009, it stated that final budgetary approval was authorized for only one position, which went to a veteran. *Id.*, Tab 15 at 2; Tab 22, Exs. 5, 13. The agency submitted a Standard Form 50 for an MRT appointment that was effective April 26, 2009, was not to exceed May 25, 2010, and indicated that the selectee was a 10-point preference eligible. *Id.*, Tab 15, Ex. 2. The agency later explained that the indefinite appointment will be converted to a permanent one once the selectee successfully completes a Professional Standards Board process. *Id.*, Tab 22 at 2.

¶3 The appellant filed a VEOA appeal alleging that he attempted to file an application for an MRT position around February 15, 2009, but the agency refused to accept his application and appointed less qualified individuals, despite the fact that he is a 10-point preference eligible.[1] IAF, Tab 1 at 2-3, 8; Tab 3 at 3; Tab 9, Exs. A-3 – A-5. Specifically, he contended that because he is a 20 percent service-connected disabled veteran, the agency was required to receive his application whether the vacancy announcement was open or closed. *Id.*, Tab 3 at 3; *see id.*, Tab 16, Ex. E. In support of this contention, he cited the Office of Personnel Management's (OPM's) Delegated Examining Operations Handbook.

---

[1] The appellant had previously filed a complaint dated May 2, 2009, with the Department of Labor (DOL) alleging that the agency violated his veterans' preference rights; DOL received the complaint on June 8, 2009; and, in a June 8, 2009 letter, DOL notified him that his complaint was without merit. IAF, Tabs 3, 6, subtabs 2b, 2c.

Id., Tab 7 at 3. He also claimed entitlement to a Veterans Recruitment Appointment (VRA). *Id.*, Tab 1 at 3, 8-9. Later, the appellant asserted that the agency misapplied valid OPM requirements constituting an employment practices violation. *Id.*, Tab 9 at 2-4.

¶4 Without holding a hearing, the administrative judge issued an initial decision in which he found that the appellant had established VEOA jurisdiction, but ultimately failed to prove that the agency violated any relevant veterans' preference statute or regulation, or the agency's veterans' preference policy. Initial Decision (ID) at 4-9, 10-14. In doing so, he found that the agency's policy of using veterans' preference only when applicants were equally qualified was appropriate. *Id.* at 7-8. Further, he concluded that the regulation allowing late applications from 10-point preference eligibles, and 5 U.S.C. § 3304(f) regarding merit promotions, apply only to the competitive service, and this was an excepted service position. *Id.* at 11-12. The administrative judge found that the VRA does not apply because this was an excepted service position and the agency was not required to use the VRA. *Id.* at 13-14. He also determined that the Board lacks jurisdiction over the appellant's employment practices claim, which he docketed as a separate appeal, although he issued a single initial decision. *Id.* at 9-10.

¶5 The appellant has filed various documents, including a petition for review. Petition For Review (PFR) File, Tabs 1, 3, 5, 7, 9. He alleges, among other things, that the agency was required to consider his application as a 10-point preference eligible. *Id.*, Tab 5 at 2; Tab 7. The agency has filed a response opposing the petition for review. *Id.*, Tab 8.

ANALYSIS

The agency must comply with the veterans' preference requirements set forth in Title 5 of the United States Code in filling hybrid positions under 38 U.S.C. § 7401(3), and the Board will determine any violation of those requirements by analyzing Title 5 veterans' preference provisions.

¶6 The administrative judge correctly found that the Board has VEOA jurisdiction over appeals from applicants for hybrid positions under 38 U.S.C. § 7401(3). He incorrectly found, however, that the agency could limit its consideration of such applicants' veterans' preference by handbooks, instructions and guidance, and, in essence, use veterans' preference status as a "tie-breaker" to select between qualified candidates. We find that the agency's use of veterans' preference status as a "tie-breaker" in its selection process is inadequate and that the agency must comply with the competitive service veterans' preference requirements set forth in Title 5 of the United States Code in filling positions under 38 U.S.C. § 7401(3).

¶7 Certain medical positions in the Veterans Health Administration (VHA) are governed by Title 38. Those positions are identified in 38 U.S.C. § 7401(1) through (3). Section (1) covers physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries; section (2) covers scientific and professional personnel such as chemists and microbiologists; and section (3) covers a wide range of other medical positions, including MRTs.

¶8 Positions identified in 38 U.S.C. § 7401 are in the excepted service and the Secretary of Veterans Affairs has the authority to establish qualifications for the positions. *See* 38 U.S.C. §§ 7402(b)(14), 7403(f)(1)(A); *Carrow v. Merit Systems Protection Board*, 564 F.3d 1359, 1362 (Fed. Cir. 2009) (explaining that one of the changes effected by the Veterans Health Care, Capital Asset, and Business Improvement Act of 2003, Pub. L. No. 108-170, §§ 301-304, 117 Stat. 2042, 2054-60, was the expansion of the "hybrid" Title 38 personnel system to include several classes of employees that had previously been in the competitive service).

By statute, many of the positions are filled "without regard to civil-service requirements." 38 U.S.C. §§ 7403(a)(1), 7405(a). The U.S. Court of Appeals for the Federal Circuit has held that Title 5 provisions (the "civil service requirements"), including those regarding veterans' preference rights, do not apply to appointments made "without regard to civil service requirements." *Scarnati v. Department of Veterans Affairs*, 344 F.3d 1246, 1248 (Fed. Cir. 2003) (construing 38 U.S.C. § 7403(a)); *see also Vores v. Department of Veterans Affairs*, 113 F. App'x 916, 918 (Fed. Cir. 2004) (finding that similar language in 38 U.S.C. § 7406 meant that 5 U.S.C. § 3330a "cannot override the discretionary power given to the VHA to select [medical] residents under 38 U.S.C. § 7406").[2]

¶9 Unlike other VHA medical professionals appointed under Title 38, however, employees in § 7401(3) positions retain many Title 5 rights, including adverse action and reduction-in-force appeal rights. 38 U.S.C. § 7403(f)(3). Moreover,

> [i]n using such authority to appoint individuals to such positions, the Secretary shall apply the principles of preference for the hiring of veterans and other persons established in subchapter I of chapter 33 of title 5.

38 U.S.C. § 7403(f)(2). "[T]he applicability of the principles of preference referred to in paragraph (2) . . . shall be resolved under the provisions of title 5 as though such individuals had been appointed under that title." 38 U.S.C. § 7403(f)(3). In other words, Title 5 competitive service veterans' preference requirements apply to appointments made for 38 U.S.C. § 7401(3) positions, such as MRTs. Therefore, the agency's policy of using veterans' preference essentially as a tie-breaker for equally qualified applicants is insufficient as it does not provide Title 5 competitive service veterans' preference rights in

---

[2] The Board has held that it may rely on unpublished decisions of the U.S. Court of Appeals for the Federal Circuit if it finds the court's reasoning persuasive. *Scott v. Department of the Air Force*, 113 M.S.P.R. 434, ¶ 10 n.4 (2010).

considering applicants for Title 38 hybrid positions. *See Marshall v. Department of Health & Human Services*, 107 M.S.P.R. 241, ¶ 6 (2007) (describing some of the Title 5 veterans' preference requirements).

The appeal must be remanded to determine whether the agency violated certain of the appellant's veterans' preference rights.

¶10 To be entitled to relief under VEOA, the appellant must prove by preponderant evidence that the agency's action violated one or more of his statutory or regulatory veterans' preference rights in its selection process. *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶ 10, *review dismissed*, 199 F. App'x 948 (Fed. Cir. 2006). Here, as noted above, the appellant asserted that the agency violated his veterans' preference rights by improperly refusing to accept his late-filed application. He asserted that he is a 20 percent service-connected disabled veteran, and, thus, the agency was required to receive his application for an MRT position whether the vacancy announcement was open or closed. IAF, Tab 3 at 3; *see id.*, Tab 16, Ex. E. In support of this contention he cited the Office of Personnel Management's (OPM's) Delegated Examining Operations Handbook. *Id.*, Tab 7 at 3.

¶11 We find that the appellant proved that he is a 10-point preference eligible and that he attempted to submit an application for an MRT position around February 15, 2009, shortly after the vacancy announcement closed. The appellant declared under penalty of perjury that he is a 10-point preference eligible and submitted documentation showing he has a 20 percent military service-connected disability. IAF, Tab 3 at 3; Tab 16, Ex. E. He also declared under penalty of perjury that around February 15, 2009, he attempted to submit an application for an MRT position, and the record contains an MRT application signed by the appellant and dated February 6, 2009. *Id.*, Tab 3 at 3-5; Tab 9, Exs. A-3 – A-5.

¶12 The question remains, however, whether the agency was obligated to accept and consider his late-filed MRT application. Under 5 U.S.C. § 3305(b), OPM "shall hold an examination for a position to which an appointment has been

made within the preceding 3 years, on the application of an individual who qualifies as a preference eligible under section 2108(3)(C)-(G) of this title." This includes disabled veterans. 5 U.S.C. § 2108(3)(C). The Board has found that 5 U.S.C. § 3305(b) is a statute relating to veterans' preference. *Villamarzo v. Environmental Protection Agency*, 92 M.S.P.R. 159, ¶ 8 & n.1 (2002). Thus, a violation of that statute can be a basis for a VEOA claim. *See* 5 U.S.C. § 3330a(1)(A).

¶13 OPM's implementing regulations provide the following:

> A 10-point preference eligible is entitled to file an application at any time for an examination for any position for which OPM maintains a register, for which a register is about to be established, or for which a non-temporary appointment was made in the preceding three years.

5 C.F.R. § 332.311(a). Further, OPM's Delegated Examining Operations Handbook, Chapter 4, § A (2007) provides that a 10-point preference eligible may file an application at any time for any position for which (1) a register is about to be established; (2) a non-temporary appointment was made in the preceding 3 years; or (3) a *list of eligibles* currently exists, but is closed to new applicants.

> If the preference eligible applies for a specific position, meets the qualifications for the position, and is within reach for referral for the position, the examining office must ensure that the preference eligible is referred on the certificate as soon as possible.
>
> If no job announcement is open and you receive a 10-point preference eligible's application, you should establish procedures for handling the application in compliance with 5 U.S.C. § 3305. You should inform the preference eligible of these procedures as well as the status of his or her application.

Id., Chapter 5, § C. OPM's VetGuide also provides that

> [a] 10-point preference eligible may file a job application with an agency at any time. If the applicant is qualified for positions filled from a register, the agency must add the candidate to the register, even if the register is closed to other applicants. If the applicant is qualified for positions filled through case examining, the agency will ensure that the applicant is referred on a certificate as soon as

> possible. If there is no immediate opening, the agency must retain the application in a special file for referral on certificates for future vacancies. . . .

IAF, Tab 22, Ex. 11.

¶14 Although the above-cited authorities refer to "registers," OPM's Delegated Examining Operations Handbook, Chapter 5, § C makes it clear that 5 U.S.C. § 3305 and 5 C.F.R. part 332 apply equally to "case examining" hiring procedures, whereby an agency fills a position through a vacancy announcement, as was the case here. *See Grandberry v. Department of Homeland Security*, 108 M.S.P.R. 309, ¶ 15 (2008) (finding that OPM, via its Delegated Examining Operations Handbook, expanded the scope of a similar regulation using the term "register" to include positions filled by agencies under their delegated examining authority). Although the Delegated Examining Operations Handbook states that it applies only to the competitive service, the provisions therein construing veterans' preference statutes and regulations apply equally to the excepted service. *See* 5 U.S.C. § 3320 (vacancies in the excepted service shall be filled in the same manner and under the same conditions required for the competitive service by 5 U.S.C. §§ 3308-3318); *Gingery v. Department of Defense*, 550 F.3d 1347, 1353-54 (Fed. Cir. 2008).

¶15 Based on the above-cited provisions, at a minimum, the agency should have accepted the appellant's application and followed application-handling procedures that comply with 5 U.S.C. § 3305(b). Delegated Examining Operations Handbook, Chapter 5, § C. According to OPM's VetGuide, this would include referring the appellant on a certificate as soon as possible, and if there was no immediate MRT opening, retaining his application in a special file for up to 3 years for referral on certificates for future vacancies. IAF, Tab 22, Ex. 11. As we found previously, the appellant proved that he attempted to submit an application for the MRT position around February 15, 2009. IAF, Tab 3 at 3-5; Tab 9, Exs. A-3 – A-5. Based on the appellant's notarized declaration under

penalty of perjury, which the agency has not contested, we further find that the appellant proved that the agency did not accept his application. *See* IAF, Tab 3 at 3-5. Accordingly, we find that the agency has violated these veterans' preference requirements and that corrective action is warranted.

¶16 It also appears that a "list of eligibles" within the meaning of 5 C.F.R. part 332 may have existed but was closed to new applicants at the time the appellant attempted to submit his application. However, further examination and interpretation of the relevant regulation and the Delegated Examining Operations Handbook are necessary on this matter. In the version of OPM's regulation that was applicable when the events in this case occurred, the term "certificate" is defined as a "list of eligibles from a register submitted to an appointing officer so that he may consider the eligibles for appointment." 5 C.F.R. § 332.102(a). On the other hand, although the Delegated Examining Operations Handbook provides that a 10-point preference eligible may apply at any time for any position for which a "list of eligibles" exists, it also states that applications from persons who are entitled to file late should be accepted and processed only up until the time that a "certificate" is issued. It continues that "[o]nce a certificate is issued, however, you should not amend it to include late applications unless requested to do so by the selecting official." Delegated Examining Operations Handbook, Chapter 4, § A. In *Grandberry*, the Board interpreted this provision to mean that an agency should accept and process a 10-point preference eligible's application up until the time that a "certificate" is issued in an action. 108 M.S.P.R. 309, ¶ 15. It did not explain what "certificate" meant in this context, however. The Delegated Examining Operations Handbook Glossary does not contain a definition for "certificate," but it defines "certificate of eligibles" as "[a] list of the highest-ranked eligibles in score and veterans preference order, submitted to a selecting official for appointment consideration in accordance with the competitive selection laws and regulations."

¶17 It is not entirely clear that OPM intended "certificate" and "certificate of eligibles" to mean the same thing, but it appears that they are used interchangeably in the Delegated Examining Operations Handbook. If those terms are synonymous, then there is a discrepancy between OPM's regulation and its Handbook regarding whether a "certificate" is merely a "list of eligibles" or a "list of the highest-ranked eligibles in score and veterans preference order." This is significant for multiple reasons. First, this would mean that the Delegated Examining Operations Handbook contains a narrower definition of "certificate" than 5 C.F.R. § 332.102(a) does. Second, if a "certificate" is a "list of eligibles," the Delegated Examining Operations Handbook is internally inconsistent, as it provides that a 10-point preference eligible's late application should be accepted if a "list of eligibles" exists, but is closed to new applicants; however, it should not be accepted if a "certificate" has been issued. Delegated Examining Operations Handbook, Chapter 4, § A. Third, in this matter, the "certificate" issued on February 10, 2009 appears to be a list of all qualified applicants, rather than a list of the highest-ranked eligibles in score and veterans' preference order. IAF, Tab 15, Ex. 1. Thus, the precise definition of "certificate" will govern whether the agency violated the appellant's veterans' preference rights by not adding him to its February 10, 2009 "certificate" and considering him for the MRT vacancies at issue in this matter.

¶18 As the administrative judge correctly explained, the Board may decide a VEOA appeal on the merits, without a hearing, where there is no genuine dispute of material fact and one party must prevail as a matter of law. IAF, Tab 18 at 3-4; *see, e.g., Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 9 (2008). Here, however, there are genuine disputes of material fact, as well as legal issues to be resolved, which the parties have not had an opportunity to consider or brief. Therefore, we find it appropriate to remand this case for the administrative judge to take further evidence and argument, and, if necessary to hold a hearing, on these issues.

The appellant failed to sustain his burden of proving by preponderant evidence that the agency violated VEOA by denying him the right to compete.

¶19 The appellant also asserted that he was denied the right to compete for the vacancies under 5 U.S.C. § 3304(f)(1). That provision states that "[p]reference eligibles who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures." 5 U.S.C. § 3304(f)(1). There is no indication, however, that the vacancy was or should have been filled using merit promotion procedures.[3]

ORDER

¶20 Accordingly, we remand the appellant's VEOA appeal, Docket No. SF-3330-09-0725-I-1, for the administrative judge to take additional evidence and argument, and, if necessary, to hold a hearing, on whether the agency was required to consider the appellant's late-filed application for the MRT vacancies at issue in this matter. The administrative judge should then issue an initial decision setting forth his findings and incorporating the findings of this Opinion and Order, including that the appellant is entitled to corrective action because the agency failed to accept and process his application in accordance with 5 U.S.C. § 3305(b), *see supra* ¶ 15.

¶21 This is the final decision of the Merit Systems Protection Board in the appellant's employment practices appeal, Docket No. SF-300A-10-0045-I-1. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

---

[3] We also find that the administrative judge correctly dismissed the employment practices appeal for lack of jurisdiction.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS
in DOCKET NO. SF-300A-10-0045-I-1

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.